STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

PAUL PITNER, Charging Party, v. CONTRA COSTA COMMUNITY COLLEGE DISTRICT, Respondent.	Case No. SF-CE-2292-E PERB Decision No. 1520 May 8, 2003

Appearances: Van Bourg, Weinberg, Roger & Rosenfeld by Stewart Weinberg, Attorney, for Paul Pitner; Atkinson, Andelson, Loya, Ruud & Romo by Suzanne V. Uzelac, Attorney, for Contra Costa Community College District.

Before Baker, Whitehead and Neima, Members.

DECISION

BAKER, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Paul Pitner (Pitner) of a Board agent's dismissal of his unfair practice charge. The charge alleged that the Contra Costa Community College District (District) violated the Educational Employment Relations Act (EERA)[1] by failing to hire him for a full-time position. Specifically, Pitner alleges that the District refused to hire him after he expressed sympathy during his interview towards other faculty members who were protesting certain management practices.

After reviewing the record in this matter, including Pitner's appeal and the District's response, the Board reverses the Board agent's dismissal for the reasons set forth below.

[1] EERA is codified at Government Code section 3540 et seq. Unless otherwise noted all statutory references are to the Government Code.

BACKGROUND

Pitner is employed by the District as a part-time instructor. On or about March 22, 2002, Pitner applied for a full-time position at Diablo Valley College. Pursuant to the applicable collective bargaining agreement (CBA) between the District and exclusive representative, Pitner was interviewed by both a faculty committee and a management committee, which included the college president. The CBA provides that where the faculty committee and president cannot agree on a candidate, each side may submit recommendations to the chancellor for final recommendation to the Governing Board.

Pitner alleges that during his interview with the president on April 12, 2002, he was asked about the "climate of the faculty." Pitner was also asked how he could assure management that he would be different from the faculty members who were contentious. Pitner alleges that this interview occurred one week prior to a "no confidence" vote on the president that was being organized by other faculty members. Although the faculty members organizing the "no confidence" vote were not acting on behalf of the exclusive representative, they were protesting, in part, "management practices on the Diablo Valley Campus as those practices impacted certificated employees on some matters within the scope of representation." Pitner alleges that he responded to the president's question in a way that revealed Pitner was "not unsympathetic" to the faculty members organizing the vote.

After the interviews were completed, Pitner received the recommendation of the faculty committee. The president recommended another candidate. Before the chancellor could make a decision, the president's candidate withdrew from consideration. The president then forwarded his second choice to the chancellor. Pitner alleges that the president's actions violated the CBA which did not authorize the president to submit another candidate upon the

withdrawal of the president's first choice. On June 10, 2002, the chancellor chose the president's candidate for the position.

BOARD AGENT'S DECISION

Pitner alleges that the District discriminated against him in violation of EERA section 3543.5(a).[2] The Board agent analyzed Pitner's charge using the familiar framework set forth in Novato Unified School District (1982) PERB Decision No. 210 (Novato). In the dismissal letter, the Board agent questioned whether Pitner engaged in protected activity. The Board agent noted that there is no evidence Pitner supported or participated in the "no confidence" vote being organized by other faculty members or that he was protesting management practices regarding issues within the scope of representation. Instead, Pitner merely responded that he was "not unsympathetic" to the cause of the faculty members organizing the "no confidence" vote. However, for purposes of the dismissal letter, the Board agent assumed that Pitner had engaged in protected activity.

Even assuming, arguendo, that Pitner engaged in protected activity, the Board agent dismissed the charge on the grounds that Pitner failed to establish the required nexus. The Board agent rejected Pitner's argument that there were irregularities during the hiring process. Specifically, the Board agent rejected Pitner's argument that the District violated the CBA by

[2] EERA section 3543.5(a) provides:

> It shall be unlawful for a public school employer to do any of the following:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

forwarding the name of the president's second choice after the president's first choice withdrew. The Board agent held that the plain language of the CBA did not prohibit such a substitution. Other than the alleged violation of the CBA, the Board agent concluded that Pitner had proffered no other evidence of discriminatory animus other than the fact that the adverse action occurred in close temporal proximity to Pitner's protected conduct. Since temporal proximity alone was not sufficient to establish nexus, the Board agent dismissed the charge.

PITNER'S APPEAL

Pitner argues that nothing in the CBA allows the District to submit a second recommendation to the chancellor upon the withdrawal of the first recommendation. Pitner also argues that the president improperly queried him about his personal feelings towards the "no confidence" vote being organized by other faculty members. Pitner argues that the president's questioning should be considered direct evidence of discriminatory intent, or at least sufficient evidence to warrant an inference of discriminatory intent.

DISTRICT'S RESPONSE

The District denies that it violated the applicable provisions in the CBA. Specifically, the District argues that nothing in the CBA prohibits the president from submitting another candidate after the president's first choice withdrew. The District also claims that all candidates were asked the same series of questions. According to the District, the president only asked Pitner about his views on the "institutional climate." The District denies that Pitner was asked about his feelings towards faculty members who were contentious.

The District also argues that in addition to the reasons set forth in the dismissal letter, Pitner's charge should also be dismissed because Pitner did not participate in protected

activity. The District notes that Pitner admits that the "no confidence" vote was not sanctioned by the union. Since the vote was not sanctioned by the union, the District argues that it was not protected activity.

DISCUSSION

Protected Activity

To demonstrate a violation of EERA section 3543.5(a), the charging party must show that: (1) the employee exercised rights under EERA; (2) the employer had knowledge of the exercise of those rights; and (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employees because of the exercise of those rights. (Novato; Carlsbad Unified School District (1979) PERB Decision No. 89.)

In analyzing the charge, the Board agent assumed that Pitner had engaged in protected activity. The District argues that there is no evidence of protected activity since Pitner was not one of the faculty members organizing the "no confidence" vote. Even if Pitner had been one of those faculty members, the District argues that his participation would not be protected activity since it was not sanctioned by the union.

Even assuming that Pitner was not one of the faculty members organizing the "no confidence" vote, the District's arguments must be rejected. Neither the letter nor spirit of EERA section 3543.5(a) limits its protections to those who directly participate in protected activity. (San Leandro Unified School District (1983) PERB Decision No. 288 (San Leandro); Pleasant Valley School District (1988) PERB Decision No. 708 (Pleasant Valley); see McPherson v. Public Employment Relations Board (1987) 189 Cal.App.3d 293, 309-10 [234 Cal.Rptr. 428] (McPherson).) Indeed, the language of the statute refers to the

"exercise of rights" guaranteed by EERA. (EERA sec. 3543.5(a).) Thus, it has been held that a violation of EERA can occur where an employer discriminates against an employee based on a mistaken belief that the employee has participated in protected activity. (McPherson at p. 310.) Similarly, an employer should be prohibited from discriminating against an employee based on the employer's belief that the employee would be supportive of others participating in protected activity.

Here, the charge alleges that the District discriminated against Pitner because Pitner voiced support of other faculty members who were protesting management practices on matters within the scope of representation. Pitner's statement that he was "not unsympathetic" to the cause of the faculty members organizing the "no confidence" vote is, in essence, a statement of support. This is especially true since the president asked Pitner "how he could assure management that he would be different from the faculty members who were contentious." Pitner's support of the other faculty members, even though he did not actually participate in that organization, should be protected as an exercise of his rights under EERA. Accordingly, the Board finds that Pitner's vocal support of the faculty members protesting management practices on matters within the scope of representation was protected activity.

The District responds that no protected activity can be found since the actions of the faculty members organizing the "no confidence" vote were not sanctioned by the union. However, nothing in EERA limits protected activities to those officially sanctioned by an exclusive representative. (San Leandro; Pleasant Valley; McPherson.) Further, there is no evidence that the "no confidence" vote was illegal or otherwise prohibited. Even if the vote were improper, Pitner has also alleged that the faculty members were protesting management practices on issues within the scope of representation. To the extent that these factual

allegations are in dispute, they should be resolved at a hearing before an administrative law judge (ALJ). At this stage, Pitner's essential allegations must be deemed true. (Golden Plains Unified School District (2002) PERB Decision No. 1489 (Golden Plains); San Juan Unified School District (1977) EERB[3] Decision No. 12 (San Juan).)

Nexus

The third element of Novato requires that Pitner establish a nexus between the protected activity and the adverse action. In other words, Pitner must establish that the District acted with discriminatory intent. PERB has long recognized that direct evidence of discriminatory intent – the proverbial "smoking gun" – is rarely possible. (See Oakdale Union Elementary School District (1998) PERB Decision No. 1246.) Accordingly, the Board has held that circumstantial evidence of discriminatory intent may be sufficient to establish the required nexus. Circumstantial evidence of discriminatory intent may include the timing of the employer's adverse action, the employer's disparate treatment of the employee, the employer's departure from established procedures and standards, etc.

It is axiomatic that the purpose of an employment interview is to elicit information from a candidate in order to make a hiring decision. Here, the charge alleges that Pitner was queried about his position on the upcoming "no confidence" vote. Pitner was asked how he could assure the president that Pitner would be "different from the faculty members who were contentious." The Board finds that asking such questions during an employment interview creates a strong inference of discrimination, and in some situations, constitutes direct evidence of discrimination. Such questions are akin to asking an interviewee whether he or she will join

[3] Prior to January 1978, PERB was known as the Educational Employment Relations Board or EERB.

the union if hired, or asking a female interviewee whether she intends to have children in the near future. These questions serve little or no legitimate purpose other than to allow the employer to make an employment decision based on an improper basis. Accordingly, the Board holds that when an employer asks an interviewee whether he or she is sympathetic to other employees exercising their rights under EERA, the third prong of Novato is satisfied for purposes of establishing a prima facie case. As the Board finds that Pitner has established the required nexus based on the questions asked of him during the interview, it is not necessary to address Pitner's arguments regarding the CBA.

The District denies that it queried Pitner about his feelings on the "no confidence" vote or that it asked him whether he would be as contentious as the other faculty members. However, as noted above, the Board must assume the truth of the essential facts alleged when deciding whether to issue a complaint. (Golden Plains; San Juan.) Thus, the issue of whether Pitner was actually asked the alleged questions should be addressed at a hearing before an ALJ.

Based on the above discussion, the Board reverses the Board agent's dismissal and remands this case to the General Counsel's office for issuance of a complaint.

ORDER

The unfair practice charge in Case No. SF-CE-2292-E is hereby REMANDED to the Office of the General Counsel with instructions to issue a complaint in this matter.

Members Whitehead and Neima joined in this Decision.